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# Supreme Court of the United States.

October Term, 1978.

No. 78-67.

TRUSTEES OF BOSTON UNIVERSITY,  
PETITIONER,

*v.*

NATIONAL LABOR RELATIONS BOARD,  
RESPONDENT.

Supplemental Brief to Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the First Circuit.

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**Supplemental Brief to Petition for a Writ of Certiorari  
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The Petitioner, Trustees of Boston University, submits this supplemental brief in order to call to the attention of the Court the decision of the Court of Appeals for the Second Circuit in *NLRB v. Yeshiva University*, Dkt. 77-4182 (2d Cir. July 31, 1978). The *Yeshiva* case was decided after Boston University had filed its *Petition*. Boston University submits that the *Yeshiva* decision provides an additional reason why the Court should grant its *Petition* and also lends support to the reasons previously advanced by the University in its *Petition* filed on July 11, 1978.

THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE  
SECOND CIRCUIT IN *NLRB v. Yeshiva University*.

In *NLRB v. Yeshiva University*, *supra*, the Second Circuit Court of Appeals refused to enforce an order of the National Labor Relations Board directing Yeshiva to bar-

gain with a union certified by the Board as bargaining agent for the faculty. The decision of the Second Circuit conflicts with the First Circuit's decision in *Trustees of Boston University v. NLRB*, 575 F. 2d 301 (1st Cir. 1978) (reproduced in *Appendix A* of the *Petition, supra*, pp. 35-55).

In its representation decision in *Yeshiva*,<sup>1</sup> the Board held, *inter alia*, that neither full-time faculty nor department chairmen or their concomitants were supervisory or managerial employees, and thus all such personnel were included in the bargaining unit. The Board included the faculty based on its conclusion that "faculty participation in collegial decision making is on a collective rather than individual basis, it is exercised in the faculty's own interest rather than 'in the interest of the employer,' and final authority rests with the board of trustees." 221 NLRB at 1054 (footnotes omitted). The Board included the department chairmen in the unit based on the finding that the "chairman's authority has been effectively diffused among the department faculty pursuant to the principle of collegiality . . ." and that the chairmen "act primarily as instruments of the faculty . . . [and] . . . therefore stand largely on the same footing as the faculty, from whom they receive their authority." 221 NLRB at 1055, 1056. In support of this conclusion, the Board cited *inter alia*, *Fordham University*, 214 NLRB 971 (1974).

In its representation decision in the *Boston University* case, (*Decision and Direction of Election* reproduced in *Appendix C* of the *Petition* filed July 11, pp. 77-117), the Board concluded that the University's chairmen were not supervisors for precisely the same reasons relied upon to

<sup>1</sup> *Yeshiva University and Yeshiva University Faculty Association*, 221 NLRB 1053 (1975).

include both faculty and chairmen in *Yeshiva*.<sup>2</sup> The Board found that the record revealed the authority exercised by the chairmen "indicate[d] collective rather than authoritarian action, most of which is not only reviewable on the higher administrative levels, but which in significant numbers of cases has been shown to be ineffective . . . ." Nor were the chairmen considered to be managerial since "their interests are more akin to those of the regular faculty than to those of the administration." (*Petition, Appendix C, supra*, pp. 94, 95). In support of this conclusion, the Board cited *Fordham University*, 214 NLRB 971.

Thus the Board determinations in *Yeshiva* and *Boston University* rested upon identical doctrines and identical precedent. What is important to this petition is the differing conclusions of the First and Second Circuits as to the validity of those Board doctrines.

The First Circuit deferred to the Board's conclusion and emphasized the role of the faculty in shaping the de-

<sup>2</sup> Boston University also argued before the Board that its faculty were managerial employees and thus excluded from coverage under the Act. See Point III A of Boston University's *Response to Notice to Show Cause* submitted to the National Labor Relations Board on November 29, 1976 and reproduced in the *Joint Appendix* at pp. 122-124 filed with the First Circuit Court of Appeals. The Board, in its *Decision and Order*, 228 NLRB No. 120 (reproduced in *Appendix B* of the *Petition, supra*, pp. 57-75) refused to consider the University's contention as it claimed that the argument was not raised in the initial representation proceeding (at p. 67 n. 7). While the University considered the Board's failure to rule on its claim to be improper, an appeal on this issue was not pressed to the Court of Appeals. The managerial status of the University's faculty was somewhat academic because if the University prevailed in its argument that its chairmen were supervisors or managerial employees, which argument must be at least as strong, *a fortiori*, as such argument regarding the faculty, then the Board's certification would have been set aside. The status of the faculty could be relitigated in any subsequent representation proceeding.

cisions and recommendations of the chairmen. The Court stressed that "the department chairperson's recommendation [regarding hiring of new faculty], as is the case in other universities, is the result of [faculty] consultation." *Petition, supra*, p. 43. The Court found that the selection process for choosing a chairman "is usually based on a consensus of the faculty of the department" and that the chairmen "represent the interests of the tenured professors of the department rather than the University." *Petition, supra*, p. 44. The Court concluded that the Board was entitled to find that the chairmen were "acting 'in the interest' of the faculty, not of the employer." *Petition, supra*, p. 43.

In contrast to the deference afforded the Board by the First Circuit, the Second Circuit took issue with all three of the legal doctrines which the Board had relied on to include the faculty and chairmen in the Yeshiva bargaining unit and the chairmen in the Boston University unit. The Second Circuit analyzed and rejected each basis upon which the Board rested its decision. The Court held that just because authority is exercised "on a collective basis," does not mean that those who possess such authority should be denied managerial status. *NLRB v. Yeshiva University, supra*, slip op. at 20-23, 28.<sup>3</sup>

Similarly, unlike the First Circuit, the Second Circuit found the Board's ultimate authority argument (i.e. "the

<sup>3</sup> While the Second Circuit found it unnecessary to decide whether the fact that authority is exercised in a collegial manner precludes the participating individuals from being considered supervisors, the Court strongly indicated that collective authority was not inconsistent with supervisory status. *NLRB v. Yeshiva University, supra*, slip op. at 20-22. Even if this Court were unable to reconcile supervisory status with "collective authority" when applying such concepts to faculty, Boston University submits that its chairmen clearly possess independent indicia of supervisory status. See *Petition, supra*, pp. 20-33.

concept that the faculty has neither managerial nor supervisory status because it is subject to the ultimate authority of the Board of Trustees") to be "particularly unconvincing." *NLRB v. Yeshiva University supra*, slip op. at 26.<sup>4</sup>

Finally, the Second Circuit also rejected the Board's attempt to deprive faculty of managerial status based on the distinction that the authority of the faculty is exercised "in the interest of the faculty rather than the employer." The Court commented that "the Board's attempt to dichotomize those interests results in a strained, artificial separation." *NLRB v. Yeshiva University, supra*, slip op. at 26. While the Board's attempt to force the industrial "we — they" model on institutions of higher education seems to have been adopted by the First Circuit, *Petition, supra*, pp. 43-44, the Second Circuit has found that such a distinction cannot withstand critical analysis.

Thus the three doctrines which were the basis of the Board's unit determinations in *Boston University and Yeshiva* were accepted, largely without discussion, by the First Circuit, but were rejected, after a rather lengthy analysis, by the Second Circuit. While the two cases may have some factual distinctions, Boston University submits that the conclusions drawn from the facts and the legal doctrines employed by the Board to reach an identical result in *Yeshiva* and *Boston University* are themselves identical. The decisions of the First and Second Circuits thus present a true conflict on an obviously important issue; an issue which must be resolved by this Court if the

<sup>4</sup> In discussing the applicability of this theory to § 2(11) of the National Labor Relations Act which defines the term "supervisor", the Court commented that "[o]bviously . . . the section contemplates a review by some higher authority." *NLRB v. Yeshiva University, supra*, slip op. at 26.

National Labor Relations Act is to be applied to higher education in a consistent and coherent manner.<sup>5</sup>

**Conclusion.**

For the additional reason that there exists a conflict between the circuit courts, it is respectfully submitted that Boston University's Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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<sup>5</sup> Nor is the conflict between the two circuits diminished by the fact that the issue presented to the First Circuit was the supervisory or managerial status of department chairmen while the issue before the Second Circuit was the status of both faculty and chairmen. For in order to find that Boston University's chairmen were not supervisors or managerial employees, the Board first had to lump the chairmen with the departmental faculty as representatives of their interests. *Trustees of Boston University v. NLRB*, reproduced in *Petition, supra*, at 44. Thus if faculty are managerial or supervisory, then department chairmen, who according to the Board "are on the same footing as faculty", *Yeshiva University, supra*, 221 NLRB at 1056, must also be supervisors or managers.